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No. 95-102

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1995

ALMA TORREBLANCA DE AGUILAR, ET AL.,
Petitioners,

v.

THE BOEING COMPANY, ET AL.,
Respondent.

Reply Brief in Support of Petition for Writ of Certiorari

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TABLE OF CONTENTS

LIST OF PARTIES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

I. THE DISTRICT COURT AND FIFTH CIRCUIT IN THIS CASE ERRED IN RESPECTIVELY ASSERTING AND UPHOLDING REMOVAL JURISDICTION AND DISTINGUISHING RED CAB. 2

A. Federal jurisdiction is limited. 2

B. The Red Cab decision sets out the law. 4

C. The Defendant's burden is a heavy one. 4

D. The test is objective rather than subjective. 5

E. State ad damnum rules cannot control. 7

F. Defendant/Respondent has the burden to prove all underlying facts supporting jurisdiction. 16

CONCLUSION 17

TABLE OF AUTHORITIES

CASES

Boyer v. Snap-on Tools Corp. 913 F.2d 108 (3rd Cir. 1990), cert. denied, 498 U.S. 1085 (1991) 4

Burns v. Windsor Ins. Co., 31 F.3d 1092 (11th Cir. 1994) 2-9, 11, 12, 14, 15, 18

Caterpillar, Inc. v. Williams, 482 U.S. 386 (1987) . . 2

de Aguilar v. Boeing Co., 47 F.3d 1404(5th Cir. 1995) 10

Gaus v. Miles, 980 F.2d 564 (9th Cir. 1992) 3, 16

Kliebert v. Upjohn Co.,915 F.2d 142 (5th Cir. 1990). 6

Laughlin v. Kmart Corp., 50 F.3d 871 (10th Cir. 1995) 3

Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) 2-4, 9, 14, 17

RULE

TEXAS RULE OF CIVIL PROCEDURE 47(b) . . 7, 12, 13

TREATISE

Wright & Miller, 14A FEDERAL PRACTICE & PROCEDURE § 3702 . . . . . 3, 7

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Reply Brief in Support of Petition for Writ of Certiorari

Petitioners Alma Torreblanca de Aguilar, et al., file this Reply Brief in Support of Petition for Writ of Certiorari to urge the Court to grant certiorari and review the question presented in the Petition. Respondent has filed its Brief in Opposition to the Petition for Writ of Certiorari. Respondents have not demonstrated, nor can they, that the

Fifth Circuit was correct in its holdings in the proceedings below.[1] Petitioners file this Reply to further explain the necessity that this Court reinforce its holding in Saint Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283, 294 (1938). This Reply brief contains one Reply point of several parts.

I. THE DISTRICT COURT AND FIFTH CIRCUIT IN THIS CASE ERRED IN RESPECTIVELY ASSERTING AND UPHOLDING REMOVAL JURISDICTION AND DISTINGUISHING RED CAB.

A. Federal jurisdiction is limited.

Federal jurisdiction based on diversity of citizenship has always been, and should continue to be extremely limited. See, Burns v. Windsor Ins. Co., 31 F.3d 1092, 1095 (11th Cir. 1994); Caterpillar, Inc.v. Williams, 482

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[1] The Fifth Circuit's opinion is faithfully reproduced at App. C., A30 to A77. The opinion is reported at 47 F.3d 1404

U.S. 386, 391 & n.7 (1987); Wright & Miller, 14A FEDERAL PRACTICE & PROCEDURE § 3702 (citing Red Cab in support of the proposition that plaintiff is the master of his or her own claim; if plaintiff chooses to ask for less than the jurisdictional amount, only the sum actually demanded is in controversy).

There is a strong presumption against permitting a defendant to remove an action from a state court to a federal district court. Burns, 31 F.3d at 1095. In Burns, the Eleventh Circuit pointed out that removal statutes are construed narrowly and against federal removal jurisdiction. Id. Defendant's right to remove and plaintiff's right to choose his or her forum are not, the court stated, of equal weight. Where plaintiff and defendant disagree about jurisdiction, the federal court should always err towards remand. Id.; see also, Laughlin v. Kmart Corp., 50 F.3d 871, 873 (10th Cir. 1995) (citing Gaus v. Miles, 980 F.2d

564, 567 (9th Cir. 1992)).[2]

B. The Red Cab decision sets out the law.

In Red Cab, this Court recognized that basic federal jurisdictional approach in holding that where a plaintiff does not desire to try his or her case in the federal court, he or she may resort to the expedient of suing for less than the jurisdictional amount. When that occurs, defendant will not be allowed to remove. Red Cab, 303 U.S. at 294. This plain statement by this Court also acknowledged the related tenet that it is the plaintiff's right to select his or her forum in almost all instances. Burns, 31 F.3d at 1095.

C. The Defendant's burden is a heavy one.

The Burns court also stated that the burden of proof upon the defendant to dispute a plaintiff's express claim to

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[2] The Laughlin case, as discussed in the Petition for Writ of Certiorari, should soon be, if it is not already, on its way up seeking Writ of Certiorari in this Court. It too is inconsistent with the Fifth Circuit's opinion in this case and is another example of the need for this Court to clarify the law in this area.

an amount beneath the jurisdictional limit should be a heavy one. Id. (citing Boyer v. Snap-on Tools Corp. 913 F.2d 108, 110-112 (3rd Cir. 1990), cert. denied, 498 U.S. 1085 (1991)).

D. The test is objective rather than subjective.

The Burns court also stressed that federal courts should remember that every attorney is an officer of the court and when he or she signs a pleading, he or she is exercising his or her duty of candor to the tribunal. Id. The court went on to state:

> So, plaintiff's claim, when it is specific and in a pleading signed by a lawyer, deserves deference and a presumption of truth. We will not assume-unless given reason to do so-that plaintiff's counsel has falsely represented, . . . the value of his client's case. Instead, we will assume that plaintiff's counsel best knows the value of his client's case and that counsel is engaging in no deception. We will further presume that plaintiff's counsel understands that, because federal removal jurisdiction is in part determined by the amount of damages a

> plaintiff seeks, the counsel's choices and representations about damages have important legal consequences and, therefore raise significant ethical implications for a court officer.

Id. (emphasis added). The Eleventh Circuit later pointed out that it would not follow the Fifth Circuit's opinion in Kliebert v. Upjohn Co.,[3] which it had cited as persuasive in its reasoning, to the extent that it required defendant to prove plaintiff's bad faith or dishonesty in order to prevail on the issue of whether a plaintiff could actually recover more than the express amount claimed and more than the jurisdictional minimum. Id. at 1096.

Rather, the Eleventh Circuit, we respectfully submit, correctly held that the standard was an objective one. [P]laintiff's or plaintiff's counsel's subjective intent in

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[3] 915 F.2d 142 (5th Cir. 1990), vacated for reh'g en banc, 947 F.2d 47 (5th Cir.), appeal dism'd per stipulation of settlement. 947 F.2d 736 (5th Cir. 1991).

drafting the prayer is not the true issue. Id. This standard makes the most sense and is antithetical to the approach taken by the Fifth Circuit. The objective approach taken by the Eleventh Circuit minimizes federal diversity jurisdiction as Congress intended. The bad Faith approach taken by the Fifth Circuit which permits defendants into federal court upon the minimalist showing of a preponderance would unacceptably broaden diversity jurisdiction. Wright & Miller, 14A FEDERAL PRACTICE AND PROCEDURE §§ 3702, 3725 (asserting, prophetically in light of the Fifth Circuit's opinion in this case, that adopting lower standards for defendants who wish to demonstrate that plaintiff's claim is actually worth more than the jurisdictional minimum would render those minimums meaningless).

E. State ad damnum rules cannot control.

Further, the Burns court expressed concern for

precisely the problem caused by the Fifth Circuit's opinion in this case. TEXAS RULE OF CIVIL PROCEDURE 47(b) states that:

> An original pleading which sets forth a claim for relief, whether an original petition, counterclaim, cross-claim, or third party claim, shall contain (b)in all claims for unliquidated damages only the statement that the damages sought are within the jurisdictional limits of the court.

The Burns court made clear that given the existence, and indeed, prevalence, of ad damnum clause requirements such as that of Texas and Alabama, where plaintiffs are only permitted to state that the damages claimed are in excess of the jurisdictional minimum, the state procedural rule will determine when federal jurisdiction exists. Id. at 1096.

The court continued by expressing its fear that such an application and interpretation of state procedural rules would lead to the inconsistent application of federal jurisdictional rules. The court refused to construe the

federal removal statute in such a way or promote such inconsistency. Id.[4]

The approach taken in Burns is more aligned with the concept of federal uniformity than that concocted and espoused in the Fifth Circuit's opinion in this case.

The Fifth Circuit, in addressing the issue discussed by Burns concerning the interplay of state procedural rules and federal jurisdiction had this to say:

> The Eleventh Circuit has expressed reluctance to allow state rules of procedure to determine when federal jurisdiction exists. . . . We note, however, the cases that we have cited, especially those mentioned by the St. Paul Mercury (Red Cab) Court, which expressly reference state procedural rules in the context of removal.

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[4] The Eleventh Circuit also stated, in a footnote, that Congress had already contemplated situations where the Plaintiff can and will intentionally avoid federal jurisdiction. Burns, 31 F.3d 1092, 1097 n.12 (discussing the joinder situation under 28 U.S.C. § 1446(b)). Thus, the court concluded, Congress would not find the result in Burns, that Plaintiff could eventually increase its damage demand, offensive. In the present case, there is not even the possibility of increased damages that Burns contemplated because of the cap volunteered by Petitioners.

> Moreover, while the Eleventh Circuit fears the inconsistent application of federal jurisdictional rules, we observe that the same rule will now hold throughout the circuit. The general principle is that plaintiffs will have to show that they are bound irrevocably by their state pleadings in these situations. Certainly, plaintiffs who plead for specific damages and who are in states that have procedural rules binding them to their pleadings will satisfy their burden more easily. Others will have the same opportunity to avoid federal court but will have to choose another method to show their commitment to recovery below the federal threshold.

de Aguilar v. Boeing Co., 47 F.3d 1404, 1412 n.10 (5th Cir. 1995). This rule is almost completely nonsensical. It is impossible to see why the Fifth Circuit is willing to permit the various procedural rules of the three states within its jurisdiction to determine federal jurisdiction in light of the well established federal principles of uniformity. In addition, this is plainly in stark contrast to the Eleventh Circuit's approach in Burns.

It is unclear why the Fifth Circuit has chosen a rule which will increase federal jurisdiction at the expense of decades of jurisprudence favoring both the plaintiff's choice of forum and limited diversity and removal jurisdiction. Yet this is what they have done.

Indeed, the facts of this present case fit well into the fact pattern in Burns. The Fifth Circuit, in its opinion, states that Petitioners claim that damages are capped at $50,000 exclusive of interest and costs is to be treated as more like a claim for one sum rather than a claim for an unlimited or an unspecified amount of damages. . . . Therefore, the claim that damages are capped at $50,000 exclusive of interest and costs should be viewed in the same light as the claim for $45,000 in Burns. That is, using the preponderance of the evidence test, and placing the burden of proof exclusively upon the defendant, the district court should view an irrevocable cap on damages, such as the one

in place in the instant case, in the same manner as did the Burns court. The underlying state procedural rule should not play a role, in the interest of federal uniformity and limited jurisdiction.

Moreover, even if the underlying state jurisdictional rule is considered, its violation by Petitioners in this case is not fatal to their attempt to limit their damages claim. Respondent makes much of the fact that Petitioners have violated Rule 47(b) in stating a numerical measure of damages as opposed to simply stating that the damages are within the jurisdictional limit of the court, as stated in the rule.

The rule, as it is written, plainly does not contemplate the eventuality of removal. Respondent argues that given this Rule, Petitioners attempt to voluntarily cap damages pre-removal and pre-answer is meaningless.

The response to this argument is set forth by the

court in Burns. That is, state jurisdictional rules should not control federal jurisdiction. However, another argument is that, given the mechanism of removal where defendants are not required to file a responsive state court pleading, and are only required to file notice of removal, in a state such as Texas, the Plaintiff would never have the opportunity to effectively challenge defendant's estimation of its damages.

The Texas rule plainly contemplates a state court responsive filing, and in doing so, demonstrates its true purpose. The last paragraph of the rule states that:

> Relief in the alternative or of several different types may be demanded; provided, further, that upon special exception the court shall require the pleader to amend so as to specify the maximum amount claimed.

TEX.R.CIV.P. 47 (emphasis added).

In Texas, a special exception is a pleading filed by defendant, or one responding to a cross-claim or counterclaim or the like, which is designed to ascertain the

opponent's claim with greater clarity. The two provisions of Rule 47 therefore go hand in hand. The party initiating the claim is required to plead its damages generally, and the opponent is then required to specially except if it wants to learn the maximum amount of damages claimed by Plaintiff. In the removal setting, this is not possible.

Therefore, Plaintiff has no opportunity to specify its damages in the removal situation, and, under the Fifth Circuit's analysis and interpretation of Red Cab, plaintiffs from states with rules like Texas' are at the mercy of defendants who seek the benefits of federal courts. This is the reason that the Burns court ruled the way it did with respect to the various state jurisdictional rules. They do not contemplate anything beyond state court proceedings.

This is not they way it is supposed to work. The burden has been shifted by the Fifth Circuit. Red Cab has been twisted and dissected beyond recognition.

This Court, we respectfully argue, should make clear that the Burns analysis is the law, and that federal jurisdiction is uniformly applied, and minimized. The burdens of proving federal jurisdiction should not be shifted to plaintiffs in some states and not others.

It is said that hard cases make bad law. The Fifth Circuit, in an effort to deny an American forum to plaintiffs where, given the exercise of f.n.c., the district court's jurisdiction over defendant's is presumed, has gone far out of its way to shift the burdens placed upon parties to removal. Plaintiffs in states with ad damnum provisions such as Texas will be in a Catch-22, and in diversity settings, will almost always be removed by the defendant to federal court under the Fifth Circuit's analysis. If they plead a specific figure of damages, they will be accused of bad faith. If they do not, they will almost certainly be removed. Surely the Eleventh Circuit's approach is

preferable, and is in fact, the law.

F. Defendant/Respondent has the burden to prove all underlying facts supporting jurisdiction.

In Gaus v. Miles, Inc., 980 F.2d 564, 566-67 (9th Cir. 1992) the court stated that:

> If it is unclear what amount of damages the plaintiff has sought, . . . then the defendant bears the burden of actually proving the facts to support jurisdiction, including the jurisdictional amount.

Id. at 567 (emphasis added). In other words, defendant must set forth the underlying facts supporting the federal court's jurisdiction. Respondent has set forth no such facts in this case. Instead Respondent relies upon prior rulings in this case and estoppel arguments. Further, Respondent has offered nothing in settlement of this case. It is disingenuous when Respondent suggests that damages are in excess of $50,000 but has not offered a cent in settlement.

Additionally, Respondent suggests that it is

Petitioners burden to set forth the facts supporting its authority to limit the claims in this case to below the jurisdictional minimum for diversity jurisdiction. Respondent cites case law in support of the proposition that proof of a matter of avoidance is the burden of the party asserting it irrespective of who has the burden on the underlying issue. Respondent's Opposition at 14. Clearly those cases did not contemplate the removal situation where, as stated above, the removing party unquestionably has the burden to prove the underlying facts which support jurisdiction. Additionally, this is not an issue of avoidance. Rather, Petitioners have set forth the facts regarding their limited damages, and it is Respondents who, at all times, should have the burden of setting forth facts which disprove the limit on those damages.

CONCLUSION

The Fifth Circuit and the District Court in this case

have interpreted this Court's Red Cab opinion in a manner that is contrary to the most basic principles of federal jurisdiction. Further, this holding serves to highlight the wide disparity between the circuits on the issue of who is preferred in the choice of forum analysis; plaintiffs, or defendants. The circuits have handed down opinions that are directly at odds, and also opinions of every shade in between on this issue. This Court, we respectfully urge, should take this opportunity to clarify its holding in Red Cab and quell this uncertainty.

The Eleventh Circuit, in Burns, has made clear that the plaintiff is favored, even in situations rife with potential for abuse.[5] In contrast, the Fifth Circuit, in a thinly veiled attempt to counteract the Texas Legislature's decision to do away with f.n.c., have made bad law. As a result,

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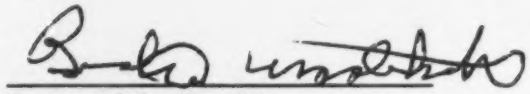
[5] See Burns, 31 F.3d at 1097 n.12.

Petitioner's have been denied their choice of forum, to which they were rightfully entitled.

As a further result, Petitioners who made valid claims under the jurisdictional limit are being subject to these collateral attacks concerning their ability to limit their claims for damages which were never intended by Congress in creating removal jurisdiction. Petitioners respectfully ask this Court to overturn the lower courts' opinions in this case in favor of the Eleventh Circuit's approach.

Respectfully submitted,



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